1999

Everett Thomas v. Board of Education; San Juan School District : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EVERETT THOMAS,	:	990232
Plaintiff and Appellant,	:	Case No. 990232-CA
v.	:	
BOARD OF EDUCATION OF THE SAN JUAN SCHOOL DISTRICT,	:	Priority No. 15
Defendant and Appellee.	:	

BRIEF OF DEFENDANT/APPELLEE

Appeal from an Order Granting Defendant's Motion for Summary Judgment of the Seventh Judicial District Court in and for San Juan County, State of Utah, Honorable Bryce K. Bryner, Presiding

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ORAL ARGUMENT NOT REQUESTED BY DEFENDANT/APPELLEE

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BRIEF OF DEFENDANT/APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Plaintiff/appellant, Everett Thomas, brings this appeal from an order of the Seventh Judicial District Court granting summary judgment for defendant school district on his negligence claim. Jurisdiction in this Court is appropriate under Utah Code Ann. § 78-2a-3(2)(j) (1996) pursuant to a transfer from the Supreme Court of Utah by order dated June 23, 1999.

ISSUE PRESENTED UPON APPEAL AND STANDARD OF APPELLATE REVIEW

The sole issue before the Court for review is whether the district court correctly held that plaintiff/appellant failed to establish any special relationship with the school district forming grounds for a duty of care to prevent injuries he sustained when attempting to start a vapor-locked district vehicle.

Standard of Review: In negligence claims, "[t]he issue of whether a duty exists is a question of law to be determined by the court." Hunsaker v. State, 870 P.2d 893, 897 (Utah 1993);

see also Ferree v. State, 784 P.2d 149, 151 (Utah 1989) (same); Weber ex rel. Weber v. Springville City, 725 P.2d 1360, 1363 (Utah 1986) ("The question of whether a 'duty' exists is a question of law, and this court, which is not bound by the trial court's conclusions, may independently review the issue").

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issue before the Court for decision is contained in the body of this brief.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiff initiated this negligence action on May 30, 1996 (R. 1-4). The complaint alleged that the San Juan School District breached its duty of care by negligently maintaining and/or operating a district-owned vehicle in a dangerous condition, leaving him with burn injuries when he voluntarily poured gasoline into the carburetor to start the engine. The school district answered (R. 16-22), denying liability and asserting a number of affirmative defenses. The case was assigned to a second judge (R. 10) after the first was disqualified on plaintiff's affidavit of bias and prejudice (R. 6-9). Plaintiff also moved to disqualify the school district's counsel (R. 25-33), but the motion was denied (R. 47-49). The second judge entered an order of recusal, dated

November 25, 1998 (R. 134-36), on the basis of his prior involvement with a criminal case in which plaintiff was the defendant, and a third judge was appointed (R. 172-74).

On December 1, 1998, the school district moved for summary judgment (R. 137-38), explaining in its accompanying memorandum (R. 139-68) that because it had no "special relationship" with plaintiff, it owed him no duty of care. Plaintiff submitted a memorandum in opposition (R. 181-254) explicitly disavowing any dispute of the facts the school district presented as the basis for its motion (R. 181). The judge granted the motion (R. 272-75), holding that plaintiff, who had volunteered his assistance, "does not fall within the ambit of those persons to whom [a] duty was owed" (R. 273). The court further held that plaintiff's voluntary assistance was not foreseeable (id.). Plaintiff's timely notice of appeal (R. 284-85) followed the entry of the district court's final order.

B. Statement of Relevant Facts

On May 24, 1994, Robin Benallie, a teacher employed by the San Juan School District, drove a group of her students to a boarding school operated by the Bureau of Indian Affairs (BIA) in Aneth, Utah, for the purpose of putting on a play (R. 140-41, ¶¶ 1-2). The vehicle she drove was a district-owned 1984 Suburban. When the performance was over, Ms. Benallie and the students loaded the Suburban for the return trip, but she was unable to start it (R. 141, ¶ 3). She then reentered the BIA school, by which plaintiff was employed, to call the San Juan

School District employee with whom she had arranged to use the Suburban (R. 231) and who had directed her to call him if she experienced problems with the vehicle (R. 232).

Plaintiff had seen Ms. Benallie with her students on the step of the BIA school when he was on his way to another building to do some photocopying (R. 161). On his way back to the main building, some 15 to 20 minutes later, he saw a BIA janitor trying to start the Suburban by priming the carburetor, and stopped to volunteer his assistance (R. 161-62). When Ms. Benallie first observed him, he was in front of the Suburban pouring gasoline into the carburetor (R. 154). She attempted to talk to him, but his attention was focused on his conversation with the janitor (R. 163). By plaintiff's own admission, Ms. Benallie never asked him to assist her (R. 165-66). As he continued to pour gasoline into the carburetor and the vehicle backfired, the gasoline exploded, burning both plaintiff and Ms. Benallie (R. 166-67).

SUMMARY OF ARGUMENT

The district court's decision in the school district's favor was based on the absence of a duty running to plaintiff based on either "special relationship" or foreseeability grounds. Rather than citing evidence of record that demonstrates error in the court's analysis on these essential points, plaintiff argues only that the school district's general duty not to use a vehicle which it knew or should have known posed an unreasonable risk of

harm to others necessarily reaches him and warrants a trial on the issue of its breach. His presumption that he lies within the class of protected "others" wrongly focuses his argument on the scope of the district's duty rather than on its applicability to him.

Although an abundance of Utah case law addresses the factors which bear on the establishment of a "special relationship" conferring a duty, plaintiff has chosen to support his argument primarily with non-binding case law from other jurisdictions. His dissatisfaction with the result under Utah law does not diminish its authority. The evidence of record shows that plaintiff was neither a foreseeable victim of the school district's actions nor one to whom the district owed a special duty of care. Consequently, plaintiff has demonstrated no reversible error for this Court to correct.

ARGUMENT

I. PLAINTIFF'S CASE CANNOT GO FORWARD BECAUSE HE WAS NOT A FORESEEABLE VICTIM OF THE SCHOOL DISTRICT'S ACTIONS AND THE SCHOOL DISTRICT DID NOT OWE A DUTY OF CARE TO HIM INDIVIDUALLY.

As established by the Supreme Court of Utah, "[o]ne essential element of a negligence action is a duty of reasonable care owed to the plaintiff by defendant. Absent a showing of a duty, [a plaintiff] cannot recover." Beach v. Univ. of Utah, 726 P.2d 413, 415 (Utah 1986) (citation omitted) (emphasis added); see also Ferree, 784 P.2d at 151 (negligence plaintiff "must first establish a duty of care owed by the defendant to the

plaintiff"). Plaintiff asserts that, as the owner of the allegedly defective Suburban, the school district "had the legal duty to maintain that vehicle in good and safe operating condition" (Brief of Appellant at 11). He then leaps to the conclusion that because he was injured when the Suburban backfired, he was necessarily a foreseeable victim to whom that duty ran. This leap in logic is belied by the cautionary words in one of the cases on which he explicitly relies: "the concept of duty should not be equated with specific details of conduct. Duty refers to the relationship between individuals; it imposes a legal obligation on one party for the benefit of the other party. The specific details of conduct involved do not determine the duty owed but bear on the issue of whether a defendant has breached a duty owed." Alhambra Sch. Dist. v. Superior Court, 165 Ariz. 38, 796 P.2d 470, 473 (1990). Absent a duty to plaintiff, there can be no breach.

The district court determined "that it was not foreseeable that the Plaintiff would voluntarily attempt to assist the Defendant by pouring gasoline in the carburetor with the attendant injury. Accordingly, the Plaintiff was not within the scope of those persons to whom the duty was owed" (R. 273). Plaintiff does not take issue directly with this conclusion. Instead, he attempts to sidestep it by arguing, in essence, that had the allegedly defective vehicle not been in his presence through the school district's violation of its duty, he would not have volunteered to help start it and consequently would not have

been injured. While supporting his claim by asserting that Ms. Benallie "requested help and stood by while something she knew to be dangerous was occurring" (Brief of Appellant at 13, n.1), he ignores completely his own admission that she never sought his assistance (R. 165-66) and that when she attempted to speak with him, he didn't pay attention to what she was saying because he was already involved in efforts to start the Suburban (R. 163). Ms. Benallie's actions are simply insufficient to create a duty elevating plaintiff's status to that of a foreseeable victim.

Moreover, under Utah law, "[t]o hold a government agency or one of its agents liable for negligence or gross negligence, a plaintiff cannot recover for the breach of a duty owed to the general public, but must show that a duty is owed to him or her as an individual." Madsen v. Borthick, 850 P.2d 442, 444 (Utah 1993); see also Hunsaker, 870 P.2d at 897 (special relationship duty is "necessary premise for any negligence liability of the State actors"); Ferree, 784 P.2d at 151 ("plaintiff must show a breach of a duty owed him as an individual, not merely the breach of an obligation owed to the general public at large by the governmental official"); Higgins v. Salt Lake County, 855 P.2d 231, 236 (Utah 1993) (same); Cannon v. Univ. of Utah, 866 P.2d 586, 589 (Utah App. 1993) ("when the government deals generally with the welfare of all, it does so without a duty to anyone, unless there is a 'special relationship' between the government and the individual"). Plaintiff avers in his complaint that defendant "is a public body and a governmental entity" (R. 1,

¶ 2); he is consequently bound by the requirement to show that the school district owed him a duty beyond the duty it owed to the public at large. His attempt to eliminate the "special relationship" requirement from this case runs contrary to binding Utah precedent.

Plaintiff asserts that the school district violated a duty to him through its failure to protect him, claiming that "Ms. Benallie did not give any instructions to anyone and did not try to stop Mr. Thomas, or anyone else, from trying to start the engine in the way being attempted by Mr. Ebert, his co-employee, and Mr. Thomas" (Brief of Appellant at 8). Accepting this allegation as true, solely for purposes of this argument, it does not relieve plaintiff of the necessity of showing a "special relationship" with the school district. "In cases where the alleged negligence consists of a failure to act, the person injured by another's inaction must demonstrate the existence of some special relationship between the parties creating a duty on the part of the latter to exercise such due care in behalf of the former." DCR Inc. v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983); see also Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 835 (Utah 1984); Turnbaugh v. Anderson, 793 P.2d 939, 944 (Utah App. 1990).

As to whether plaintiff established a "special relationship with the school district, the court explained,

> Although the court finds that the [defendant][1] owed a duty of due care to properly maintain the 1984 Suburban, the Court finds that the Plaintiff does not fall within the ambit of those persons to whom the duty was owed. The 1984 Suburban was disabled in a parking lot, allegedly with "vapor lock," when the Plaintiff offered to help without being asked by Defendant or any of its agents. The Court cannot find, on the basis of the record, that the Defendant, through any of its agents, including Ms. Benallie, assumed responsibility for the safety of the Plaintiff who was a "volunteer." Under the circumstances of this case, there were no "special relationships" existing between the Plaintiff and the Defendant as discussed in Beach v. University of Utah, 726 P.2d 312 (Utah 1986) at 415, that would impose a duty to protect the Plaintiff.

R. 273. In Beach, the supreme court noted that "[o]rdinarily, a party does not have an affirmative duty to care for another." Beach v. Univ. of Utah, 726 P.2d at 415. The court further observed that "[t]he law imposes upon one party an affirmative duty to act only when certain special relationships exist between the parties. Those relationships generally arise when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection." Id. Plaintiff has pointed to nothing in the record that suggests the school district, through Ms. Benallie or otherwise, took responsibility for his safety or denied him his normal opportunities for self-protection. In fact, he rebuffed Ms. Benallie's attempted communication (R. 163) in favor of the conversation he initiated with others who were attempting to start the Suburban, as revealed by his deposition testimony:

> Q: As you were walking back did anyone stop you

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[1]The order mistakenly reads, "Although the Court finds that the Plaintiff owed a duty of care . . ." (R. 273).

or ask you to do something?

A: No.

Q: Okay. Tell me what you did next then.

A: Then I came and talked to [BIA janitor] Ebert and said, "What happened, you guys? Won't start?" And I did talk straight to -- express back and forth about what Mr. Star [Ebert] was doing. And he said that, "Well, these kids got stuck and they couldn't start it and something happened to them."

And the hood was already open. And so I stopped right there and said, "If you need a hand, I'll help you."

So that's when I started helping him. And that's -- at the time he had a coffee can of gas --

Q: And Robin Benallie was already there?

A: She was already there, standing with the kids on the other side on the step.

Q: Did you talk to her?

A: I don't specifically remember exact words, what she said, but I know she said something. But mostly I responded to the guy that was talking to me straight and forth to the vehicle, which was Mr. Star. I keep telling him, "I pour [the gasoline] now, you start it now and see what happens.

R. 162-63. Far from showing the creation of a "special relationship," this exchange demonstrates that plaintiff ignored Ms. Benallie and involved himself in the situation without her encouragement or solicitation. Rather than being denied his normal opportunities for self-protection, he willingly exposed himself to the dangers that ultimately caused his injury. Further, his testimony shows that he directed at least a part of the action:

Q: Tell me what you remember happening then. You've told me you are pouring the gas in. Did you expect Mr. Star to try to turn the engine as you were pouring gas in? Or was he supposed to wait until you told him to go ahead?

A: Well, it seemed like the amount of time that he did it himself -- you know, he poured it in there and he got in the vehicle, it backfired and kind of choked a little bit -- I think that's the

backfiring. Kind of shoo, and then it stopped. That's when I went over there. And we waited and then I poured it in and I told him to start it then, "Turn it right now." So that's when -- I had the can away from the carburetor.

Q: An that's when the flames --

A: No. That's when he started again and did the same thing. It was turning and starting to turn and then it conked out. So my third time I approach it -- that's where I don't know if he turned the keys on or if there was some spark in there or if there was flames in there. As I pour it in, all of a sudden it just shoo and hell broke loose. So I don't really know if he had the keys on or if he was doing it. But I know I ordered him to turn on --I don't know if I told him to turn it on, but I was pouring the gas, and that's when it blew up in our face.

R. 166-67.

Plaintiff has failed to distinguish himself from any other member of the public with respect to the defendant school district. Anyone could have stopped to volunteer assistance in the same way he did. He was not singled out by an agent of the school district requesting his help. His actions were not directed by an agent of the school district. In fact, Ms. Benallie testified in her deposition that just before the backfire, "I was telling him, 'Well, I just called [the school district]. They told me to leave it alone.' And I think he told me, 'Oh, we can get it started' or something. And then I don't know if they started -- I think they started the engine, and then flames shot up" (R. 154). It appears from this uncontroverted testimony that plaintiff was acting against, not in compliance with, Ms. Benallie's express intentions.

The Suburban, at rest in the boarding school parking lot, was not dangerous to anyone. Only when plaintiff unforeseeably

involved himself in attempting to restart it in a dangerous manner did it become a mechanism of injury. Plaintiff stood in no different relationship to the school district than any other member of the public. The school district did not act to deprive him of his normal means of self-protection or to guarantee his safety. Because, under these circumstances, the school district owed no affirmative duty of care to plaintiff individually, the district court correctly granted summary judgment in its favor. Plaintiff has provided no reasoned analysis on which to base a reversal of that decision.

II. THE CASES ON WHICH PLAINTIFF RELIES ARE EASILY DISTINGUISHABLE FROM THE PRESENT ACTION.

Plaintiff cites a number of cases, primarily from other jurisdictions, in support of his argument that the school district owes him a duty of care. See Brief of Appellant at 11-15. Each of these cases is easily distinguishable from the case at bar.

Two of the cases are cited for the proposition "that the owner of a vehicle may be held liable to a third person for personal injuries caused by a defective condition of which the owner had or should have had knowledge" (Brief of Appellant at 12). However, the result in both cases turns on statutory liability. In Murry v. Advanced Asphalt Co., 751 P.2d 209 (Okla. App. 1987), the plaintiff was injured when her vehicle was struck by a trailer that had become separated from a dump truck. The evidence showed that the trailer had not been properly secured with a pin and safety chains as required by statute. The court

held that the statutory violation constituted negligence per se. Murry, 751 P.2d at 212. Bush v. Middleton, 340 P.2d 474 (Okla. 1959), involved a plaintiff who was injured in an automobile collision when the brakes failed on a car belonging to Middleton while it was being driven by a potential purchaser. The appellate court reversed the demurrer in favor of Middleton on grounds of statutory requirements mandating adequate brakes and prohibiting a vehicle owner from permitting an unsafe vehicle to be driven on a highway. In the present case, plaintiff has pointed to no statutory duty violated by the school district. Thus, these cases are inapposite.

Plaintiff also cites Kent v. Gulf States Utilities Co., 418 So.2d 493 (La. 1982), in support of his claim that an owner's actual or constructive knowledge of a chattel's defective condition confers a duty on the owner to take reasonable steps to protest against injurious consequences of that condition. However, the case interpreted a Louisiana Civil Code provision under Louisiana case law. Plaintiff has made no showing of a similar Utah statute.

To establish the breadth of foreseeability, plaintiff invokes two Arizona cases and an Oklahoma case. Although Rudolph v. Arizona B.A.S.S. Federation, 182 Ariz. 622, 898 P.2d 1000 (1995), does stand for the general proposition that Arizona courts view the class of risks and the class of foreseeable victims broadly in establishing a duty between litigants, plaintiff fails to recognize that, in contrast, when suing a

government entity in Utah, he must establish a special duty of care owed to him individually (see Point I, supra). Alhambra School District v. Superior Court, 165 Ariz. 38, 796 P.2d 470 (1990), turns again on statutory as well as common law duty under Arizona, not Utah, interpretation. Moreover, both cases were decided subsequent to the decision of the Supreme Court of Arizona in Ryan v. State, which abandoned the public duty doctrine that had been adopted in Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969):

> "[W]e conclude that the doctrine in *Massengill* should be abandoned and that case is overruled. We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery.

Ryan v. State, 134 Ariz. 308, 656 P.2d 597, 599 (1982). As discussed above, the public duty doctrine is alive and well in Utah. And while Baine v. Oklahoma Gas & Electric Co., 850 P.2d 346 (Okla. App. 1992), states a general rule extending a duty to all foreseeably endangered persons, it also notes that a duty to the particular plaintiff is a threshold question (Baine, 850 P.2d at 348)--one that was unmet by the plaintiff in that case. As the Baine court recognized, the defendant was under "no duty to 'anticipate every possible fortuitous circumstance that might cause injurious contacts'" with the mechanism of injury. Id. at 349-50 (quoting Florida Power and Light Co. v. Lively, 465 So.2d 1270, 1274 (Fla. Dist. Ct. App. 1985)).

Even the Utah cases plaintiff cites are unavailing.

Language he quotes from Hoffman v. Life Insurance Co. of North America, 669 P.2d 410, 416 (Utah 1983), acknowledging foreseeability as a measure of the scope of a defendant's duty in tort, is presented only as a general premise against which to contrast the interpretation of contractual language at issue in the case. Such general statements do little to illuminate the "special relationship" plaintiff is obligated to show in order to recover against a Utah governmental defendant. Nor does Drysdale ex rel. Strong v. Rogers, 869 P.2d 1 (Utah App. 1994), serve plaintiff's contentions. Not only does it emphasize the general applicability of the "special relationship" analysis in Utah (869 P.2d at 2), but finds no special relationship--and hence, no duty--between the plaintiff and defendant on the facts of the case.

As noted in Point I above, it is well established in Utah case law that unless plaintiff can demonstrate a duty running to him as an individual distinct from the general public, defendant is necessarily without liability to him. Plaintiff cannot bypass this showing by relying on less rigorous standards of courts in other jurisdictions. His reliance on these non-controlling cases ought not to be credited.

CONCLUSION

In the district court, plaintiff failed to establish an essential element of his negligence claim: that defendant owed him an individual duty of care. No further inquiry was necessary

to dispose of the case, as without a duty, no liability for negligence is possible. Plaintiff's attempt to skip over this threshold inquiry cannot overcome his burden of proof. Because he did not meet that burden, the district court's grant of summary judgment to the school district warrants this Court's affirmance.

Therefore, defendant respectfully requests the Court to affirm the judgment of the district court.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLISHED OPINION

Defendant believes the law is sufficiently established as to the issue in this case that a decision can be rendered without oral argument and published opinion. However, in the event that oral argument is ordered by the Court, defendant wishes to participate.

Dated this 1st day of September, 1999.

Nancy D. Kemp
Attorney for Defendant/Appellee

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of September, 1999, I caused to be mailed, postage prepaid, two true and accurate copies of the foregoing BRIEF OF DEFENDANT/APPELLEE to the following:

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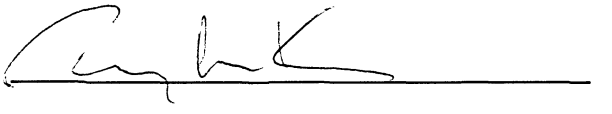

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